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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

## No. 76-359

U. S. INDUSTRIES, INC. and
DIVERSACON INDUSTRIES, INC.,
Petitioners,

versus

F. BROWNE GREGG,
Respondent.

## BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-359

U. S. INDUSTRIES, INC. and
DIVERSACON INDUSTRIES, INC.,
Petitioners,

versus

F. BROWNE GREGG,
Respondent.

# BRIEF IN OPPOSITION

Respondent opposes issuance of the writ of certiorari sought by petitioners, conceiving that petitioners' statement of the question presented is both overbroad and inaccurate. Moreover, petitioners' statement of the case omits reference to material facts which clearly demonstrate that the judgment and result of the Circuit Court decision below are correct on the stated ground as well as on the basis of two additional constitutional grounds not reached by that court.

## QUESTIONS PRESENTED

Respondent conceives that the questions presented should be stated as follows:

I.

Does application of the Delaware statute which provides that Delaware is the situs of Delaware corporate stock (8 DEL.C. §169), in support of judicial seizure, under Delaware's sequestration procedure,* of stock in a Delaware corporation owned by a nonresident defendant having no contacts with Delaware other than such stock ownership, for the purpose of compelling that defendant's personal appearance in Delaware to answer transitory claims wholly unrelated to Delaware upon pain of forfeiting his interest in the stock for failure to personally appear, offend the concepts of fundamental fairness embodied in the due process clause of the fourteenth amendment to the United States Constitution as construed in *International Shoe Company* v. *Washington* (1945), 326 U.S. 310; and *Hanson* v. *Denckla* (1958), 357 U.S. 325?

II.

Does the Delaware sequestration procedure — which provides for pre-hearing seizure of property owned by a nonresident defendant in which plaintiff has no right or lien; does not require the complaint to be verified or the supporting affidavit to contain proof of the specific facts underlying the plaintiff's claim; permits the judge to issue the order without determining that plaintiff's claim has apparent validity; and does not require plaintiff

* See 10 Del.C. §366; 8 Del.C. §324; 6 Del.C. §8-317(1); Del.Ch.Rule 4(db).



to post a sufficient bond to protect the defendant against damages; and requires the sale of the property before an appealable judgment can be entered — violate the minimum procedural prerequisites held to be required by the due process clause of the fourteenth amendment to the United States Constitution in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* (1975), 419 U.S. 601; *Mitchell* v. *W. T. Grant Company* (1974), 416 U.S. 600; *Fuentes* v. *Shevin* (1972), 407 U.S. 67; and *Sniadach* v. *Family Finance Corporation* (1969), 395 U.S. 337?

III.

Does the Delaware sequestration procedure violate the requirements established by the due process clause of the fourteenth amendment to the United States Constitution by forcing a nonresident defendant having no significant contact with the State of Delaware, other than that created by the fictional situs of stock statute (8 DEL.C. §169), to submit to the general jurisdiction of the Delaware courts and defend against transitory claims unrelated to Delaware without limiting liability to the value of the property sequestered, upon pain of forfeiture of that property should defendant not so appear?

## STATEMENT OF THE CASE

The constitutional question decided by the Circuit Court below arose in the following manner:

U. S. Industries, Inc. (USI), a Delaware corporation having its principal place of business in New York, and Diversacon Industries, Inc. (Diversacon), a Florida corporation having its principal place of business in Florida, instituted this action against F. Browne Gregg, a citizen and resident of the State of Florida, in the Delaware Court of Chancery (Pet. A. 9-10).* The complaint was divided into eight counts which contained claims for common law deceit; federal securities law violations; breach of warranty; rescission; and breach of contract (Pet. A. 10-11). It sought $20 million in damages and the impressment of a constructive trust on USI stock held by Gregg (Pet. A. 11-12). None of the claims arose out of either Gregg's or plaintiffs' title to, or property rights in, the USI stock sequestered (Pet. A. 10-11).

Delaware law provides that all stock in Delaware corporations is to be regarded as having a situs in Delaware. 8 DEL.C. §169. Employing the Delaware sequestration statute (10 DEL.C. §366), plaintiffs made an ex parte application in the Delaware Chancery Court for an order of sequestration directed to Gregg's USI stock (Pet. A. 67). The Chancery Court promptly entered such an order. Because of the provisions of Delaware Chancery Rule 4(db), adopted pursuant to Section 366(b) of Title 10 of the Delaware Code, plaintiffs were not required to, and did not, file a properly verified complaint. They filed the required affidavit stating: (a) the last-known address of the non-resident defendant; (b) a reasonable description of the property sought to be seized, its estimated amount or value,

* Hereinafter, (Pet. ___ ) refers to the Petition for Writ of Certiorari filed herein, and (Pet. A. ___ ) refers to the Appendices to the Petition for Writ of Certiorari.



and the nature of the defendant's title or interest therein; (c) the source of affiant's information as to any of these items; and (d) the reason for omission of any items not included. There is no requirement that the court make any finding concerning the probable validity or amount of a plaintiff's claim, and the Chancery Court merely found that Gregg was a non-resident and that he had property within the State of Delaware. In order to obtain such an order, it was not necessary for plaintiffs to post a bond in an amount sufficient to cover Gregg's potential damages and attorneys' fees should it subsequently be determined that the sequestration order was improvidently entered; and, in fact, while the stock seized was worth more than $2 million, plaintiffs and the sequestrator were each required to file a nominal bond of only $1,000 (Pet. A. 67).

Gregg promptly removed the action to federal court pursuant to the provisions of Title 28, United States Code, Section 1441(c), and the District Court denied a motion to remand filed by plaintiffs (Pet. A. 9).* Before the time for Gregg to respond to the complaint had passed, he moved for leave to enter a "limited" or

* In the meantime, Gregg had filed a complaint against USI in the United States District Court for the Middle District of Florida, seeking compensatory damages. *F. Browne Gregg* v. *U. S. Industries, Inc.* (filed July 24, 1972), No. 72-25-Civ-Oc. The original complaint alleged that USI had been guilty of common law fraud and deceit; violations of the federal securities laws; breach of contract; and wrongful withholding of dividends. After Gregg refused to personally appear in Delaware, USI counterclaimed in the Florida action, presenting the same claims it had made in Delaware. This action resulted in a final judgment, filed on March 15, 1976, in favor of Gregg in the amount of $1,192,000. The case is presently on appeal to the United States Court of Appeals for the Fifth Circuit. *U. S. Industries, Inc.* v. *F. Browne Gregg* (notice of appeal filed April 14, 1976), No. 76-2107.

"restricted" appearance in the District Court for purposes of defending the claims made by plaintiffs on the merits, limiting liability to the value of the property sequestered, without thereby subjecting himself to the *in personam* jurisdiction of the court (Pet. A. 42). Prior to this motion, Gregg had filed a motion to quash the sequestration and dismiss the lawsuit on the grounds that the court lacked jurisdiction over either the property seized or his person, and that the purported sequestration of Gregg's stock violated the due process and equal protection clauses of the fourteenth amendment to the United States Constitution (Pet. A. 13, 25). Both of these motions were denied by the District Court (Pet. A. 9, 41).

Thus, Gregg was faced with the choice of not appearing to defend the action in Delaware, thereby forfeiting his stock in USI; or submitting himself to the personal jurisdiction of the District Court in Delaware, thereby being forced to defend himself in an inconvenient and unrelated forum where he faced a potential liability in excess of $20 million (Pet. A. 91). Gregg chose not to appear, and instead sought certification from the District Court, pursuant to Title 28, United States Code, Section 1292(b), so that he might obtain appellate review of its decisions. The District Court denied the application for certification. Gregg then filed a notice of appeal, together with a petition for writ of mandamus or prohibition, seeking to obtain review of the District Court's rulings. The appeal was dismissed without prejudice to Gregg's right to have the matters reviewed on ultimate appeal from a final order; and the petition for writ of mandamus or prohibition was denied.



The District Court then held an ex parte hearing, at which time plaintiff Diversacon presented proof of its claim on the note. As a result of this hearing, the District Court entered an order finding that Gregg was indebted to Diversacon in an amount exceeding $400,000, and directing that the shares of stock earlier sequestered be sold to satisfy this indebtedness. Gregg again attempted to appeal, and was again thwarted because no final judgment had yet been entered by the District Court.

Finally, Gregg's stock was sold pursuant to court order. *Thereafter,* a final judgment was entered, at which time an appeal was taken to the Circuit Court below. It is from that decision that petitioners seek review by this Court.

## REASONS FOR DENYING THE WRIT

Before responding specifically to each of petitioners' reasons for granting the writ in this case, it is important to place the decision of the Circuit Court below in perspective. That decision does not raise questions of great national concern which bring into question the validity of the attachment or sequestration statutes of virtually every state, as petitioners suggest (Pet. 11). Only Delaware, of all the fifty states, has failed to join with the other forty nine in accepting the principle that judicial seizure of corporate stock can be accomplished only by physically seizing the certificates themselves.* Delaware alone persists in maintaining the fiction that the legal situs of stock in Delaware corporations remains in Delaware and, as Delaware corporate stock is widely

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* Uniform Commercial Code §8-317. (Pet. A. 64.)

traded throughout the United States and, indeed, the world, Delaware purports to extend the jurisdiction of its courts to any and all claims against a nonresident solely by reason of his ownership of Delaware corporate stock. Delaware has never enacted the usual long arm statute asserting jurisdiction over nonresident defendants; rather, Delaware uses its sequestration procedure as a "long arm statute" for acquiring personal jurisdiction over such nonresident defendants. Hence, the decision below has a significant effect on the State of Delaware, but not necessarily on any other state, and thus does not present any question of significant national concern such as to warrant the exercise of this Court's power of review.

## I. The Decision Below Does Not Irreconcilably Conflict With the Contemporaneous Decision of the Supreme Court of Delaware Cited by Petitioners.

Petitioners contend that the decision of the Circuit Court below irreconcilably conflicts with the decision of the Supreme Court of Delaware in *The Greyhound Corporation* v. *Heitner* (1976), 361 A.2d 225,* from which an appeal to this Court is presently pending *sub nom. Shaffer et al., appellants* v. *Heitner, appellee*, No. 75-1812. It is true that the Circuit Court below held that the constitutional validity of the use of the Delaware sequestration procedure as a means of obtaining personal jurisdiction over respondent in this case must be tested in light of the criteria set forth in *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, and *Hanson* v. *Denckla* (1958), 357 U.S. 235 (Pet. A. 87),

* The opinion is not yet printed in the official Delaware Reports.



while the Supreme Court of Delaware held, in the *Greyhound* case, that it was not necessary for the *International Shoe* requirements to be met before the sequestration procedure could be found to pass constitutional muster as a means of obtaining jurisdiction over the defendants. 361 A.2d at 229. To this extent, there is an apparent conflict between the two decisions.

However, in arriving at its conclusion, the Delaware Supreme Court relied upon a fallacious a priori assumption, *i.e.*, that the legal fiction created by Section 169 of Title 8 of the Delaware Code, which provides that Delaware shall be regarded as the situs of all stock in any corporation existing under the laws of Delaware, was sufficient, *in itself*, to create *quasi in rem* jurisdiction over nonresident defendants owning stock in a Delaware corporation. As the Circuit Court below correctly pointed out, that assumption by the Supreme Court of Delaware disregarded the decisions of this Court in *Texas* v. *New Jersey* (1965), 379 U.S. 674, 380 U.S. 518; *Western Union Telegraph Co.* v. *Pennsylvania* (1961), 368 U.S. 71; *Hanson* v. *Denckla* (1958), 357 U.S. 235; and *Mullane* v. *Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306; all of which recognize that, regardless of the label employed by a state court to identify the basis of its jurisdiction, there is a constitutional limit beyond which such jurisdiction may not be extended. Because the Delaware Supreme Court failed to deal with these controlling decisions, the conflict between its decision in *Greyhound* and the decision of the Circuit Court below is more apparent than real.

It is also noteworthy that, because of a factual distinction between this case and the *Greyhound* case, adoption of the decision of the Circuit Court below by the Supreme Court of Delaware would not necessarily mandate a reversal of its decision in *Greyhound*. The Circuit Court below found that, before the courts of Delaware can coercively acquire personal jurisdiction over a nonresident defendant, there must exist certain minimum contacts between that defendant and Delaware (Pet. A. 86). In this case, where the defendant was not a resident of Delaware, there was no connection with Delaware except for that based upon the legal fiction of the situs of stock of a Delaware corporation created by Section 169 of Title 8 of the Delaware Code, and the action brought by plaintiffs bore no relationship to the corporate stock or the validity of its ownership, the Circuit Court below held that

> "the fictional § 169 situs of stock in Delaware does not pass constitutional muster as a predicate for jurisdiction in an action admittedly seeking to obtain personal liability of a nonresident in connection with transactions unrelated to the forum."
>
> (Pet. A. 89.)

In *Greyhound*, however, the action brought by plaintiffs was a stockholders' derivative suit on behalf of a Delaware corporation to recover for damages to the corporation resulting from the conduct of the defendants in their capacities as officers and/or directors of the corporation. 361 A.2d at 228-29, 235-36. As the Delaware Supreme Court held, a controversy of this type has a "substantial relationship" to Delaware (*id.*



at 236), and the State has a significant interest in seeing that the alleged wrongs to the corporation, if proven, do not go unredressed. Therefore, it is entirely possible that under the decision of the Circuit Court below these considerations would provide the minimum contacts necessary to justify the exercise of jurisdiction by the Delaware courts.

Finally, petitioners' contention that "the courts of Delaware will continue to apply the law as declared by the Delaware Supreme Court" (Pet. 10-11), ignoring the decision of the Circuit Court below, warrants some discussion. Petitioners seek, by this argument, to raise the specter of defendants rushing madly from the state courts in an attempt to find sanctuary in the federal courts, while plaintiffs are doing everything within their power to prevent removal of such actions. Respondent submits that no such forum shopping will result from the decision of the Circuit Court below.

The courts of Delaware have, in the past, indicated that they would look to the decisions of the various federal courts to resolve questions relating to the breadth of the due process clause of the fourteenth amendment to the United States Constitution, *Atlas Mut. Ben. Ass'n.* v. *Portscheller* (1945), 43 Del. 298, 46 A.2d 643; *Klein* v. *Sunbeam Corp.* (Super.Ct. 1951), 47 Del. 485, 93 A.2d 732; and that, while not actually binding, decisions of lower federal courts are "entitled to the utmost respect." *Fusco* v. *Dauphin* (Super.Ct. 1950), 45 Del. 499, 75 A.2d 701, 702. There is nothing to suggest that the Supreme Court of Delaware would depart from this practice and decline to follow the decision of the Circuit Court below on a question in-

volving the minimum requirements necessary to insure due process of law under the fourteenth amendment to the United States Constitution. Accordingly, the conflict between the decision of the Circuit Court below and the Supreme Court of Delaware, to the extent that such a conflict seems apparent, is not irreconcilable, and therefore does not require the intercession of this Court.

## II. The Decision Below Does Not Conflict With the Decision in *Minichiello* v. *Rosenberg*.

Petitioners contend, in Point II of their Petition, that "the decision below is in irreconcilable conflict with the decision of the Second Circuit Court of Appeals in *Minichiello* v. *Rosenberg*, 410 F.2d 106 (2d Cir. 1968) cert. den. 396 U.S. 844 (1969)." (Pet. 12.) Respondent submits that, rather than conflicting with the decision of the Circuit Court below, *Minichiello* may easily be harmonized with that decision and, in fact, supports it.

Delaware has no "long arm statute" in the usual sense, and apparently employs the sequestration procedure here complained of for acquiring personal jurisdiction over non-resident defendants. Although Delaware characterizes the action as *quasi in rem*,*

* The Delaware sequestration procedure is classified as a *quasi in rem* action. However, the courts of Delaware, as well as the District Court below, have recognized that the procedure is designed to coerce a nonresident defendant to submit himself to the personal jurisdiction of the Delaware courts. *U. S. Industries, Inc.* v. *Gregg* (D.Del. 1972), 348 F.Supp. 1004, 1020; *Breech* v. *Hughes Tool Co.* (1963), 41 Del. Ch. 128, 189 A.2d 428; *Sands* v. *Lefcourt Realty Corp.* (1955), 35 Del.Ch. 340, 117 A.2d 365; *Loft, Inc.* v. *Guth* (1941), 25 Del.Ch. 363, 19 A.2d 721; *Weintress* v. *Bland* (Ch.Ct. 1950, 31 Del.Ch. 269, 71 A.2d 59. The title of the sequestration statute is itself a recognition of this fact: "Compelling appearance of nonresident defendant." 10 Del.C. §366.



the Circuit Court below held that, regardless of the label employed to justify the state's exercise of its judicial power — whether called *in personam*, *in rem* or *quasi in rem* — the exercise of that power to assert jurisdiction over a nonresident is subject to the constitutional limitation

> "that there be sufficient connection with the forum 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' 326 U.S. at 316."
> (Pet. A. 86.)

Therefore, the Circuit Court below determined that the *International Shoe* "minimum contacts" test must be applied where a state exercises such judicial power, in order to determine whether there has been compliance with these concepts of fundamental fairness.

A careful reading of the *Minichiello* decision reveals that it is based upon precisely the same consideration, *i.e.*, fundamental fairness, as is the decision of the Circuit Court below. As Judge Friendly, speaking for the panel in *Minichiello*, properly recognized, the *Seider*-type action [so named because of the decision of the New York Court of Appeals in *Seider* v. *Roth* (1966), 17 N.Y.2d 111, 269 N.Y.S. 2d 99, 216 N.E.2d 312] is "in effect a judicially created direct action statute" (410 F.2d at 109), by means of which "[t]he insurer doing business in New York is considered the real party in interest and the nonresident insured is viewed simply as a conduit, who has to be named as a defendant in order to provide a conceptual basis for getting at the insurer." *Id.* Beginning with this point, the *Minichiello* court examined this method of obtaining

jurisdiction over a nonresident defendant and concluded that, for the following reasons, it was not fundamentally unfair to require a nonresident defendant to defend an action of the *Seider* type in New York: (1) the real party defendant is an insurance company licensed to do business in, and regulated by, the State of New York (*id.*); (2) the injured plaintiff (*Seider* has been applied only to personal injury cases) is a resident of the State of New York, and therefore the State has an interest in his welfare (*id.* at 110); (3) the nonresident defendant need not go to the expense of retaining a lawyer to protect his interests, as he is entitled to have lawyers furnished in New York by the insurer, without expense to him (*id.* at 118); (4) the *Seider* means of obtaining jurisdiction over a nonresident defendant may only be employed in actions directly relating to the property which is seized, *i.e.*, it may be employed only in personal injury actions to determine whether the injured plaintiff is entitled to any part of the proceeds of a liability insurance policy procured by the allegedly negligent defendant (*id.*); (5) the nonresident defendant is entitled to defend the action in New York on the merits without fear of exposure to personal liability beyond the limits of his liability insurance policy (*id.*);* (6) and, finally, a *Seider* action will almost always be removable to federal court, thereby making available to the federal trial judge the provisions of Title 28, United States Code, Section 1404(a), to transfer the action to another forum if he finds that being required to litigate the matter in New York would result in a real hardship to the nonresident defendant. *Id.* at 119. Because of these numerous safeguards for the rights of a nonresident

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* It was suggested that this limitation, in itself, avoided the constitutional due process problems presented in *Minichiello*. 411 F.2d at 111 n.7.



defendant, the court in *Minichiello* concluded that, when judged by fourteenth amendment due process standards, the procedure was not fundamentally unfair as applied to the nonresident defendant.

In the present case, in stark contrast to the considerations found by the *Minichiello* court to provide sufficient protection to the nonresident defendant, the facts are that: (1) the defendant Gregg was not a resident of Delaware, conducted no business in that State, and owned no property physically located there — his only contact being the fictional situs of Delaware corporate stock created by Section 169, Title 8, Delaware Code (Pet. A. 72); (2) plaintiff Diversacon was a Florida corporation and had no contacts with Delaware whatsoever, while plaintiff USI had no significant contact with Delaware other than the fortuitous fact of incorporation in that State (*id.*), and the action involved no questions of Delaware law; (3) the defendant was forced to bear the expense of retaining lawyers to protect his interests in Delaware, although he had no contact with that State other than that created by the fictional situs provision; (4) the means of obtaining jurisdiction provided by the Delaware sequestration statute (10 DEL.C. §366) may be employed to obtain personal jurisdiction over a nonresident defendant even though the action bears no relationship to the property seized (*see* footnote, page 12, *supra*); (5) in order to defend the action, the defendant would be forced to submit to the personal jurisdiction of the Delaware courts, and thereby expose himself to personal liability beyond the limits of the property sequestered in Delaware (Pet. A. 91); and, (6) while this action was transferred to the federal court, it was not possible for the defendant to appear in federal court and move for a transfer pursuant to the provisions of Title 28, United

States Code, Section 1404(a), without making a general appearance and submitting himself to the personal jurisdiction of the court, thereby facing the possibility that, if the motion for transfer were denied, he would be forced to litigate the action in Delaware (Pet. A. 59).

From the foregoing comparison, it is apparent that the safeguards found sufficient in *Minichiello* to protect a nonresident defendant in a *Seider*-type action were not present in this case and that, therefore, the "traditional notions of fair play and substantial justice" inherent in the due process clause of the fourteenth amendment were lacking. This analysis also reveals that, because the court in *Minichiello* employed the same criteria (albeit without explicitly so stating in the opinion) as did the Circuit Court below to determine whether the due process clause of the fourteenth amendment had been violated, *Minichiello* supports, rather than conflicts with, the decision below.

### III. The Decision Below Does Not Disregard Any Controlling Precedent of This Court.

Contrary to petitioners' assertion (Pet. 14), the decision of the Circuit Court below conforms to the controlling precedents of this Court in *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, *Mullane* v. *Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, and *Hanson* v. *Denckla* (1958), 357 U.S. 235. These decisions establish that the "traditional notions of fair play and substantial justice" which are the foundation of the due process clause limit the ability of a state to exercise its judicial power to compel the personal appearance of nonresidents.



The Circuit Court below properly refused petitioners' invitation to limit the application of *International Shoe* to actions labeled *in personam*. In doing so, the Circuit Court below, applying *Mullane* and *Hanson*, rejected the argument that the requirements of the due process clause can be avoided by the use of characterizations such as *quasi in rem* and *in rem*. The Circuit Court below correctly states that such labels are of limited use and that when used to characterize actions having the purpose of acquiring personal jurisdiction over nonresidents, they must be examined in light of the "traditional notions of fair play and substantial justice" delineated in those decisions (Pet. A. 84-86).

Petitioners also take issue with the use by the Circuit Court below of the "affiliating circumstances" analysis employed by this Court in *Hanson* v. *Denckla, supra*. Petitioners would limit the application of the "affiliating circumstances" test to determinations of affinity between a state and intangible property sufficient to justify *in rem* jurisdiction, and assert that the attempt by the Circuit Court below to attribute the same constitutional content to the terms "affiliating circumstances" and "minimum contacts" is incorrect (Pet. 18). Petitioners made this argument despite this Court's statement in *Hanson*, in framing the issue before it, that:

> "The alleged defect is the absence of those 'affiliating circumstances' without which the court of a state may not enter a judgment imposing obligations on persons (jurisdiction *in personam*) or affecting interest in property (jurisdiction *in rem* or *quasi in rem*)."
>
> 357 U.S. at 245-46.

It is clear that the Circuit Court below did not misconstrue either *International Shoe* or *Hanson*, but rather, that petitioners have done so. Contrary to this Court's admonition in *Mullane* v. *Central Hanover Bank & Trust Co., supra*, that a state's characterization of the action as *in rem*, *quasi in rem* or *in personam* is not controlling (339 U.S. at 312-13), petitioners ignore the principles enunciated in those decisions and insist that Delaware's characterization of this action as *quasi in rem* is determinative of the due process question.

Petitioners erroneously assert that the Circuit Court below, by quoting with approval the concurring opinion of Judge Gibbons in *Jonnet* v. *Dollar Savings Bank of the City of New York* (3d Cir. 1976), 530 F.2d 1123, adopted such concurring opinion as its own and thereby held that *International Shoe* has overruled *Ownbey* v. *Morgan* (1921), 256 U.S. 94; *Harris* v. *Balk* (1905), 198 U.S. 215; and *Pennoyer* v. *Neff* (1877), 95 U.S. 714. Neither the decision below nor Judge Gibbons' concurring opinion in *Jonnet* contains such a statement. They simply recognize the necessity of reading the older opinions in light of the later decisions in *International Shoe* and *Mullane*.

Petitioners also place a great deal of reliance on the *Ownbey* decision. However, *Ownbey* did not deal with the constitutionality of the attachment procedure there instituted and did not involve a challenge to the state's exercise of jurisdiction over the defendant. Rather, *Ownbey* was limited to the question of whether a requirement that a defendant in an action instituted by attachment post "special bail" before he could appear and defend constituted such an arbitrary



and unreasonable requirement as to amount to a denial of due process. 256 U.S. at 103. This Court found that such a requirement did not violate the due process clause. *Ownbey* is, therefore, simply not applicable to the question involved in this case.*

The decision of the Circuit Court below does not disregard any controlling precedent of this Court, but represents an application of the principles expressed in *International Shoe*, *Mullane* and *Hanson* to the facts of this case. For this reason, the decision does not constitute a repudiation of any "trend" in favor of expansion of the scope of a state's jurisdiction over foreign corporations or other nonresidents (Pet. 18-19). The decision below merely constitutes a recognition that, whatever the "trend" might be, it is necessarily limited by the requirements of the due process clause of the fourteenth amendment.

## IV. The Two Additional Constitutional Questions Raised by Respondent in the Circuit Court Below are Sufficient to Justify the Decision Reached by that Court.

In addition to the constitutional issue raised by respondent upon which the Circuit Court below reached its decision that the Delaware sequestration procedure violated the due process clause of the four-

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* Contrary to petitioners' contention, recent citations of *Ownbey* by this Court have served only as an illustration of one instance when a pre-hearing seizure of property *may* be justified. *See Calero-Toledo* v. *Pearson Yacht Leasing Co.* (1974), 416 U.S. 663; *Mitchell* v. *W. T. Grant Company* (1974), 416 U.S. 600; *Fuentes* v. *Shevin* (1972), 407 U.S. 67.

teenth amendment to the United States Constitution, respondent also asked the Circuit Court below to resolve the following two questions which are likewise of a constitutional dimension:

> "[1] Whether the Delaware procedure for seizure of Gregg's stock without a pre-seizure adversary hearing deprived him of due process and equal protection rights? . . .
>
> "[2] Whether the denial of an opportunity to make a limited appearance, defending plaintiff's claim on the merits with any judgment limited to the value of the seized property, deprived Gregg of due process?"
>
> (Pet. A. 68.)

Because of the rationale of the decision below, the Circuit Court found that "it [was] not necessary to meet Gregg's other constitutional contentions." (Pet. A. 92.) Respondent submits that, even should this Court determine that the *basis* for the decision of the Circuit Court below may not be sustained, yet the remaining two constitutional claims presented to that court by respondent are sufficient to justify the *decision and judgment* of that court.

The Delaware sequestration procedure allows seizure prior to an adversary hearing, upon an ex parte application. Assuming, without conceding, that this is one of those "extraordinary situations" which justify postponing notice and an opportunity for a hearing until after the seizure of a defendant's property has been accomplished [*see Fuentes* v. *Shevin* (1972), 407 U.S. 67, 90-91], the Delaware sequestration



procedure remains constitutionally defective because it wholly fails to provide the procedural safeguards required by the due process clause as construed in this Court's decisions in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* (1975), 419 U.S. 601; *Mitchell* v. *W. T. Grant Company* (1974), 416 U.S. 600; *Fuentes* v. *Shevin, supra;* and *Sniadach* v. *Family Finance Corporation* (1969), 395 U.S. 337; in the following respects: (1) the Delaware procedure allows sequestration of property which is exclusively property of the defendant and in which the plaintiff claims no right or lien; (2) it fails to require that the complaint be verified or that the supporting affidavit contain proof of the specific facts underlying the plaintiff's claim of indebtedness against the defendant; (3) in practice, it allows a writ of sequestration to issue as a matter of right, requiring nothing more than a ministerial act on the part of the judge issuing the order [so long as the procedural requirements of Chancery Rule 4(db) are satisfied, the applicant is entitled to issuance of a sequestration order as a "matter of right," *Breech* v. *Hughes Tool Co.* (1963), 41 Del.Ch. 128, 189 A.2d 428]; (4) it fails to require that the plaintiff post a bond sufficient to protect the defendant's interest in the property in the event that the sequestration is later found to have been unwarranted, and does not require a bond to cover damages and attorneys' fees should it be determined that the writ of sequestration was wrongfully issued; and (5) it apparently requires the sale of the seized property before entry of final judgment and thus deprives defendant of the opportunity to obtain appellate review before sale, thereby creating a distinct possibility that an ultimate reversal on appeal will result in nothing more than a Pyrrhic victory. *See Mitchell* v. *W. T. Grant Company, supra.* For these

reasons, the Delaware sequestration procedure is patently in conflict with the requirements of the due process clause of the fourteenth amendment to the United States Constitution delineated by this Court in the above-cited decisions, and the ultimate conclusion reached by the Circuit Court below is clearly sustainable on these grounds alone.

In addition to the constitutional claims relating to the propriety of the pre-hearing sequestration procedure provided by Delaware law, respondent submits that the decision of the Circuit Court below may also be sustained for the reason that respondent was denied due process of law when he was forced to choose between failing to appear in Delaware to defend on the merits, thereby subjecting himself to a default judgment in an amount up to the value of the property sequestered; and making a general appearance in Delaware for all purposes, thereby submitting himself to potential liability greatly in excess of the value of the property sequestered. *Cf. Minichiello* v. *Rosenberg* (2d Cir. 1968), 410 F.2d 106, *cert. denied* (1969), 396 U.S. 844; *Dry Clime Lamp Corporation* v. *Edwards* (5th Cir. 1968), 389 F.2d 590. The Circuit Court below correctly recognized the iniquitous nature of this choice when it said, referring to the sequestration procedure and the interpretation of that procedure by the Delaware courts, "the nonresident defendant is inexorably put to a Hobson's choice: either surrender by default the entire value of the seized property or submit to *in personam* jurisdiction." (Pet. A. 91.)

Fundamental concepts of fairness are not satisfied when an individual is put to a choice of the type provided by the Delaware sequestration procedure.



For this reason, the Delaware sequestration procedure violates the due process clause of the fourteenth amendment, and the ultimate conclusion reached by the Circuit Court below was correct.

## CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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